

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ISABEL MENDEZ	:	DETERMINATION
		DTA NO. 817842
for Revision of a Determination or for Refund of Sales and	:	
Use Taxes under Articles 28 and 29 of the Tax Law for the	:	
Period March 1, 1996 through November 30, 1998.	:	

Petitioner, Isabel Mendez, 633 East 224th Street, Bronx, New York 10466, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1996 through November 30, 1998.

A small claims hearing was held before Jean Corigliano, Presiding Officer, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York on March 27, 2002 at 9:15 A.M. Petitioner appeared on her own behalf. The Division of Taxation appeared by Barbara Billet, Esq. (William Fowler).

ISSUES

- I. Whether the Division of Taxation reasonably calculated additional sales tax due.
- II. Whether petitioner established reasonable cause to warrant cancellation of the penalties.

FINDINGS OF FACT

1. Petitioner, Isabel Mendez, was the owner of a small grocery store called Mendez Grocery. She purchased that business in April 1996. Her father, now deceased, was the owner of the building in which the grocery store was located.

2. When she first purchased the grocery store, Ms. Mendez had very little money with which to purchase inventory. The prior owners removed all inventory and shelving before she bought the business. Ms. Mendez purchased as much inventory as she could afford and replaced it as it was sold. She attempted to build up the inventory with the profits from sales.

3. The first two sales tax returns filed by Ms. Mendez after purchase of the store were prepared by an accountant. He charged her \$100.00 per month to prepare the returns although they were filed on a quarterly basis. After the first couple of months, Ms. Mendez decided that she could not afford the accountant's services and began preparing and filing the returns herself. She filed quarterly sales tax returns throughout the audit period.

4. Ms. Mendez did not know what records the accountant used to prepare the returns. She maintained cash register tapes and entered the totals from those tapes into a general ledger. The general ledger was used to prepare the sales tax returns. Based on her testimony, it is concluded that Ms. Mendez reported profits from sales as gross sales not realizing that the tax was to be paid on taxable sales.

5. In September 1996, Ms. Mendez was diagnosed with cancer. She began chemotherapy in January 1997, and her treatment continued until the middle of 1998. Once she began chemotherapy, Ms. Mendez could no longer run the store herself. She hired a third party to operate the store, but she was losing money and was unable to maintain the operation of the store.

6. Ms. Mendez sold the grocery store to Ramon Espinell on November 30, 1998. A Notification of Sale, Transfer or Assignment in Bulk was properly filed with the Division of Taxation ("Division") reporting the sale.

7. The Division issued a Notice of Claim to Purchaser, dated December 11, 1998, notifying Mr. Espinell of a potential claim of taxes due from Ms. Mendez.

8. The Division conducted a desk audit of the books and records of Mendez Grocery for the period March 1, 1996 through November 30, 1998. By letter dated December 15, 1998, Ms. Mendez was asked for all of the books and records of the grocery store. She was also asked to contact the Tax Technician who sent the letter to discuss the audit. She did not immediately reply to this letter, and the Division decided to estimate the sales taxes due. On December 30, 1998, a Division investigator conducted an observation test of the business. He determined that the store, as operated by Mr. Espinell, had gross sales of \$500.00 per day. Mr. Espinell agreed that this was the approximate amount of his daily sales.

9. Recognizing that Ms. Mendez's sales may not have been as great as those of the new owner, the Division estimated that the sales of Mendez Grocery were approximately \$300.00 per day during the audit period. As a result of the observation test, the Division determined that 70 percent of gross sales were subject to sales tax.

10. Total taxable sales for the audit period were calculated by the Division based on the results of the observation test. A three-month quarterly period was used as a typical test period. Sales of \$300.00 per day were multiplied by 90 to calculate gross sales for the test period of \$27,000.00. The taxable ratio of 70 percent was applied to \$27,000.00, yielding taxable sales for the quarter of \$18,900.00 with tax due of \$1,559.00. For each audit period, the Division subtracted tax paid by Ms. Mendez from estimated tax due of \$1,559.00 to determine additional tax due. This resulted in a determination of tax due for the audit period in the amount of \$14,566.00.

11. The Division issued to petitioner a Notice of Determination of Sales Tax Due for the period March 1, 1996 through November 30, 1998 in the amount of \$14,566.00 plus penalty and interest.

12. Ms. Mendez offered no documentary evidence to establish the amount of her actual sales. She conceded that an estimate of \$300.00 per day in gross sales was reasonable; however, she contested the imposition of penalties.

13. The Division agreed that penalties should be abated in light of Ms. Mendez's illness and her attempt to meet her sales tax obligations throughout the audit period.

CONCLUSIONS OF LAW

A. Where a taxpayer's records are insufficient or inadequate to permit an exact computation of the sales and use taxes due, the Division is authorized to estimate the tax liability on the basis of external indices (Tax Law § 1138[a][1]; *see, Matter of Ristorante Puglia, Ltd. v. Chu*, 102 AD2d 348, 478 NYS2d 91, 93; *Matter of Surface Line Operators Fraternal Org. v. Tully*, 85 AD2d 858, 446 NYS2d 451, 452). Here, the record establishes that Ms. Mendez was unable to provide books and records for audit, either at the time they were requested or at hearing. Inasmuch as no books and records were provided, it was appropriate for the Division to estimate tax due for the audit period on the basis of whatever information it had available to it at the time.

Where the Division seeks to determine a taxpayer's sales tax liability on the basis of an indirect audit method, the methodology selected must be reasonably calculated to reflect the taxes due (*Matter of Ristorante Puglia, Ltd. v. Chu, supra*; *Matter of W. T. Grant Co. v. Joseph*, 2 NY2d 196, 159 NYS2d 150, 157, *cert denied* 355 US 869) but exactness in the outcome of the audit method is not required (*Matter of Markowitz v. State Tax Commn.*, 54

AD2d 1023, 388 NYS2d 176, 177, *affd* 44 NY2d 684, 405 NYS2d 454; *Matter of Lefkowitz*, Tax Appeals Tribunal, May 3, 1990). The burden rests with the taxpayer to show by clear and convincing evidence that the methodology was unreasonable or that the amount assessed was erroneous (*Matter of Meskouris Bros. v. Chu*, 139 AD2d 813, 526 NYS2d 679; *Matter of Surface Line Operators Fraternal Org. v. Tully*, *supra*).

B. In this case, the Division elected to estimate tax due on the basis of an observation test. Ms. Mendez agreed that the Division's estimate of \$300 per day in gross sales was reasonable. She was less certain about the taxable ratio of 70 percent, but she was not able to provide a better figure. Accordingly, I find that the audit method resorted to by the Division was reasonable, and the estimate of tax due is sustained.

C. Where a penalty is asserted under Tax Law § 1145(a)(1), as it was here, an abatement is required if it is determined that failure to comply with the Tax Law was due to reasonable cause and not due to willful neglect (Tax Law §1145[a][1][iii]). The regulations of the Commissioner of Taxation and Finance state that reasonable cause may include "any. . .cause for delinquency which would appear to a person of ordinary prudence and intelligence as a reasonable cause" (20 NYCRR 536.5[c][5]). In this case, Ms. Mendez attempted to comply with the Tax Law, first by hiring an accountant to prepare her sales tax returns. When she was unable to pay his fees, she filed the returns herself. The record reveals that Ms. Mendez filed all of the required returns. However, a very serious illness prevented her from being present in the store and from maintaining control over the business. Under these circumstances, her failure to comply with the Tax Law was due to reasonable cause. Moreover, the Division agreed at her hearing that cancellation of penalties is appropriate in this instance.

D. The petition of Isabel Mendez is granted to the extent that penalties are cancelled; the Notice of Determination, dated June 21, 1999 shall be modified accordingly; and, in all other respects, the petition is denied.

DATED: Troy, New York
May 16, 2002

/s/ Jean Corigliano
PRESIDING OFFICER